



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Kings Point Industries, Inc.

File: B-244398

Date: October 11, 1991

Harold Rosenbaum for the protester.
Maj. William R. Medsger and Capt. Paul A. Debolt, Department of the Army, for the agency.
John Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Telegraphic bid modification, which was not received by bid opening, was properly rejected as late, where the protester transmitted its bid modification to a telex number it had obtained from a solicitation issued the previous year, which was no longer in operation at the agency installation, and where the solicitation did not indicate that it had the installation capability to receive telex bid modifications.
2. Since only the government's time/date stamp or other evidence of receipt maintained at the government installation is sufficient to establish timely receipt of a bid modification, a copy of the modification furnished after bid opening that indicates that it was transmitted directly to an agency telex prior to bid opening does not allow its acceptance.

DECISION

Kings Point Industries, Inc. protests the rejection of its telegraphic bid modification as late, and the award of a contract to Aerial Machine & Tool Corp., under invitation for bids (IFB) No. DAAK01-91-B-0006, issued by the Department of the Army, Troop Support Command.

We deny the protest.

The solicitation, issued on January 3, 1991, specified that bid opening would be held at 2 p.m. on February 5, 1991. According to the IFB, bids were to be sent to the Army Troop Support Command in St. Louis, Missouri. The solicitation provided that bids may be modified by telegraphic notice.

Kings Point, whose initial bid had been timely received by the agency, sought to modify its bid by telex on the morning of February 5. The modification, which would have made Kings Point the low responsive, responsible bidder,^{1/} was sent by the protester to a telex number it had apparently obtained from a solicitation that had been issued by the Command some time in 1990. However, because the Command had discontinued its direct receipt of telex service, Kings Point's telex modification was automatically routed to the Western Union/AT&T Office in Bridgeton, Missouri, and arrived at the Command in the form of a mailgram on February 6. Because Kings Point's bid modification was not received until the day after bid opening, it was rejected by the contracting officer.

The protester argues that because the telex machine it used on the morning of February 5 to transmit its bid modification indicated before and after transmission that it was connected to USATSARCOM STL (the abbreviation for the Command), its telex must have been timely received by the agency and thus should have been considered.

As provided in the Federal Acquisition Regulation (FAR) and our decisions, the only acceptable evidence of receipt at the government installation is the time/date stamp on the bid wrapper or other documentary evidence of receipt maintained by the government installation. Singleton Contracting Corp., 68 Comp. Gen. 149 (1988), 88-2 CPD ¶ 592 (also involving late receipt of a telex routed through a Western Union office). Here, the proof offered by Kings Point of the timely receipt of its modification is its own copy of its telex, which, as mentioned previously, indicates that the telex machine it used was connected before and after transmission with the USATSARCOM STL. This is not evidence maintained by the government installation and thus does not suffice to establish timely receipt. Id. As such, there is no probative evidence of receipt at the government installation to support Kings Point's contention that its bid was timely received.

The protester also contends that if the agency has in fact discontinued its direct receipt of telex service--as the record confirms--its failure to inform potential bidders of this constitutes government mishandling, and its late bid modification should therefore be considered, regardless of its receipt by the agency the day after bid opening.

A bidder has the ultimate responsibility of assuring the timely arrival of its bid and any modification at the place designated in the solicitation. Specifically, any

^{1/} The low bidder was found nonresponsive. Kings Point's modified bid would have been second low.

telegraphic modification received after bid opening may be accepted only under the circumstances set out in the solicitation and the bidder must bear the responsibility for an otherwise late modification. Hargis Constr., Inc., B-221979, May 6, 1986, 86-1 CPD ¶ 438.

Here, the solicitation's standard late bid clause, set out in FAR § 52.214-7, permits consideration of a modification received after bid opening and before award, if it is determined by the government that the late receipt was due solely to mishandling by the government after receipt at the government installation. For mishandling after receipt to occur, the government must first have physical possession of the modification prior to bid opening. Hargis Constr., Inc., supra. That was not the case here since Kings Point's telex was automatically routed to a Western Union/AT&T Office, and did not arrive at the Command until the day after bid opening.

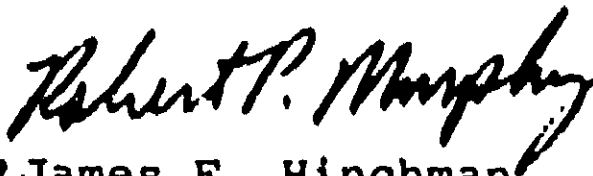
We have recognized that there may be situations not covered under the late bid clause that justify consideration of a late bid or modification. One such narrow exception whereby a bid modification received after bid opening may be considered is where government mishandling in the process of receipt (as distinguished from mishandling after receipt) was the paramount cause of the modification being late. Hargis Constr., Inc., supra. For example, we have found government mishandling in the process of receipt where the agency permitted a telex machine to run out of paper, Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD ¶ 331; when an agency's telex machine failed because the agency failed to pay Western Union the service fee, The Standard Prods. Co., B-215832, Jan. 23, 1985, 85-1 CPD ¶ 86; or where the agency had discontinued direct telex receipt or disconnected its telex machine prior to bid opening without informing bidders, even though the solicitations had expressly provided telex numbers to be used in submitting bid modifications. Kings Point Mfg. Co., Inc., B-199992, Apr. 16, 1981, 81-1 CPD ¶ 293; Singleton Contracting Corp., B-215186, Oct. 29, 1984, 84-2 CPD ¶ 471.

Here, such government mishandling did not cause Kings Point's bid modification to be received after bid opening. The solicitation did not provide a telex number for use in submitting bid modifications, nor did it imply in any way that the agency had the capability to receive telex messages directly. To the contrary, the solicitation stated that such bid modifications "were deemed to be hand-carried." While Kings Point may have been misled by the indication on its telex machine that it was connected to the installation, the protester assumed the risk that its modification would not be timely received by the agency when it used, on the day of bid opening, a telex number that it had obtained from a

solicitation issued by the agency the previous year without first confirming that the telex machine at the installation was still in operation. Contrary to the protester's assertion, we do not believe that the agency had a "duty" to inform potential bidders that it had discontinued its direct receipt of telex service, since the solicitation did not contain any reference to the agency's capability to directly receive telex service or provide any telex number to be used in submitting bid modifications.

Finally, the protester complains that it was not promptly notified by the agency that its bid modification was being rejected, as required by FAR § 14.304-2. While we agree that the agency's conduct in this regard was procedurally deficient, Kings Point was in no way prejudiced by the agency's conduct, since the agency otherwise acted properly in refusing to consider the protester's late bid modification. See United Terex, Inc., B-209462, Feb. 28, 1983, 83-1 CPD ¶ 198.

The protest is denied.


for James F. Hinchman
General Counsel